80-5000

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1979

HUEY EDWARD COON,

PETITIONER

VS

STATE OF ALABAMA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 1

Constitutional and statutory provisions involved 2

Statement of the case 3

The manner of raising federal questions 4

Reasons writ should be granted 5

I. Alabama's Statutory Prohibition Which Precludes Juries in Capital Cases From Considering Factually Established Lesser Included Offenses, Deprives All Persons Accused of Capital Crimes of Equal Protection and Due Process as Guaranteed Them by the Fourteenth Amendment.

II. The Aggravating Circumstances as Determined by the Trial Court do not Constitutionally Assure "Reliability in the Determination that Death is the Appropriate Punishment."

A. Is heinous, atrocious and cruel a reliable standard? 6

B. May an Element of the Crime Properly be an Aggravating Cricumstance? 7

Conclusion 8

Appendices

Appendix A (Opinion of the Alabama Supreme Court)

Appendix B (Opinion of the Alabama Court of Criminal Appeal)

Appendix C Code of Alabama, 1975 as amended

TABLE OF AUTHORITIES

Page

Beck v. State, Ala.Cr. App., 365 So.2d 985 (1978)..... 4,5

Cook v. State, Ala.Cr. App. 369 So.2d 1243 (1977)..... 4,7

Coon v. Ala, No. A 912 (25 April, 1980, Powell, J.)..... 1

Evans v. State, 361 So.2d 672 (Ala. 1978) 6

Gardner v. Florida, 430 U.S. 349 (1977) 6

Godfrey v. Georgia, _____ US.S _____ 48 USLW 4541 (May, 19, 1980) 7

Jacobs v. State, Ala.Cr. App., 361 So.2d 640 (1978)..... 3,6

Whisenhunt v. State, 370 So.2d 1080 (Ala.Cr.App., 1979)... 6

Williamson v. State, Ala.Cr.App., 370 So.2d 1054-affirmed Ala.Cr.App. 370 So.2d 1066 (1978)..... 4

Witherspoon v. Illinois, 391 U.S. 510 (1968)..... 6,7

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 6

STATUTES

Code of Alabama, 1975 13-11-1 through 13-11-9..... 2,5

Code of Alabama, 1975 13-11-6(8) 6

Code of Alabama, 1975 13-11-6(6)..... 7
13-11-6(4)..... 7

Georgia Code Annotated § 27-2543.1 (b)(7) 7

IN THE

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HUEY EDWARD COON, PETITIONER

v.

STATE OF ALABAMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The petitioner Huey Edward Coon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this case on 8 February, 1980.

OPINIONS BELOW

The opinion of the Alabama Supreme Court, reported at 380 So.2d 990 (Ala. 1980), appears attached hereto in Appendix A. The opinion of the Alabama Court of Criminal Appeals, reported at 380 So.2d 980 (Ala.Crim.App. 1980), appears attached hereto at Appendix B.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on 8 February, 1980. Upon application for extension of time, Hon. Lewis F. Powell, Jr., Associate Justice, granted an extension of time in which to file this petition until 7 July, 1980. Coon v. Alabama, No. A 912 (25 April, 1980, Powell, J.)

QUESTIONS PRESENTED

1. Alabama's Death Penalty Statute allows a jury to choose only between a finding of guilt with an automatic death sentence and releasing the defendant entirely upon a finding of not guilty:

(a) Where the evidence would have supported a verdict of guilt of a lesser included offense, may a sentence of death be constitutionally imposed?

2. Alabama's Death Penalty Statute requires that the trial judge consider aggravating and mitigating circumstances, as set out in the statute, in deciding whether to set aside the jury-imposed death penalty:

> (a) May the terms "heinous, atrocious and cruel," serve as an aggravating circumstance in the sentencing of a defendant by the trial court when no guidelines are provided to determine when a murder is or is not "heinous, atrocious and cruel?"
>
> (b) May the trial court consider as an aggravating circumstance a fact that is, by statute, a necessary ingredient of the capital murder charge, more particularly, that petitioner killed while committing a robbery?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves §§ 13-11-1 through 13-11-9 Code of Alabama, 1975, as amended. (Appendix C)

STATEMENT OF THE CASE

The Petitioner, Huey Edward Coon, was charged with the intentional killing of John Ezra Brown during a robbery on 29 August, 1978.

Petitioner was arrested later on August 29, 1978, and gave several statements to the police admitting being present at the time of the killing and finally on September 5, 1978, admitted that he did the killing with the testimony of petitioner and other witnesses indicating that a great deal of drinking had been going on just prior to the killing. The statements were taken without giving the petitioner an opportunity to communicate with his family for the period between August 29 and September 6, 1978.

The petitioner's trial counsel challenged the constitutionality of the Alabama Death Penalty Statute, but was overruled.

The petitioner was tried and found guilty.

The court in the death penalty hearing, or in the trial, heard evidence that the petitioner has two prior convictions for burglary/grand larceny (T.789,790).

The trial court found four aggravating circumstances which it held justified leaving the death sentence in effect:

1. That the petitioner did intentionally kill John E. Brown in the perpetration of a robbery or attempt thereof of the said John E. Brown.

2. That the petitioner committed the capital felony with which he is charged in the commission of a robbery.

3. That the petitioner committed the capital felony with which he is charged for pecuniary gain.

4. That the capital felony was especially heinous, atrocious, or cruel.

Upon a hearing on a Motion for New Trial, the trial court struck aggravating circumstance 3 (pecuniary gain), but still maintained that the death sentence was appropriate, finding "no mitigating circumstances exist." In examining the mitigating

circumstances the trial court limited itself to those enumerated in the Alabama statute. (T. 795)

The Alabama Court of Criminal Appeals affirmed the conviction and the Alabama Supreme Court considered the case on a writ of certiorari and affirmed the conviction.

THE MANNER OF RAISING FEDERAL QUESTIONS

The petitioner's trial attorneys challenged the constitutionality of the death penalty by written motion presented to the trial court (T.804) and was overruled. On appeal, both courts considered the challenge to the death penalty as foreclosed by their own earlier decisions in Jacobs v. State, Ala.Cr.App., 361 So.2d 640 (1978); Cook v. State, Ala.Cr.App., 369 So.2d 1243 (1977); Williamson v. State, Ala.Cr.App., 370 So.2d 1054, affirmed, Ala.Cr.App., 370 So.2d 1066 (1978); and Beck v. State, Ala.Cr.App., 365 So.2d 985 (1978).

REASONS WRIT SHOULD BE GRANTED

I

ALABAMA'S STATUTORY PROHIBITION, WHICH PRECLUDES JURIES IN CAPITAL CASES FROM CONSIDERING FACTUALLY ESTABLISHED LESSER INCLUDED OFFENSES, DEPRIVES ALL PERSONS ACCUSED OF CAPITAL CRIMES OF EQUAL PROTECTION AND DUE PROCESS AS GUARANTEED THEM BY THE FOURTEENTH AMENDMENT.[1]

This Honorable Court in Beck v. Alabama, _____U.S._____ (U.S. S.Ct. 78-6621, June 20, 1978), held that the death penalty could not be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not allowed to consider lesser included, non-capital offenses when those offenses were supported by the evidence.

In reaching its decision the Court set out three basic grounds: (1) ".... if the unavailability of a lesser included offense instruction enhances the risk of unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case" Beck, id at page 12-13; (2) that the Alabama statute interjects irrelevant issues into the factfinding process and diverts the jury's attention from the question of whether or not the State has proved its case and that this introduces a level of uncertainty into the factfinding process that cannot be tolerated; (3) that the post-trial hearing by the trial court cannot properly be substituted for the decision of a jury that is fully and properly charged on the appropriate lesser included non-capital offenses when the evidence supports such a charge.

Petitioner was indicted, arraigned, tried, convicted and sentenced to death under 13-11-1 et seq., Code of Alabama 1975, of capital murder without the jury being able to, even if supported by the evidence, consider lesser included non-capital offenses. Under this Honorable Courts' ruling in Beck, id, this conviction and sentence fails to meet constitutional standards and must be reversed.

---

[1] Beck v. Alabama, _____U.S._____ (U.S. S.Ct. 78-6621, June 20, 1980).

THE AGGRAVATING CIRCUMSTANCES AS DETERMINED BY THE TRIAL COURT DO NOT CONSTITUTIONALLY ASSURE "RELIABILITY IN THE DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT."

A. Is heinous, atrocious and cruel a reliable standard?

Woodson v. North Carolina, 428 U.S. 280 (1976), established that the Eighth Amendment required that the circumstances of the particular offense, character and record of the individual charged be considered before the penalty of death was inflicted at page 304. Further, Gardner v. Florida, 430 U.S. 349 (1977) established that the sentencing process, along with the trial, must comport with the Due Process Clause. Based on this, the reasonable inference is that the sentencing procedure in any capital case must assure "reliability in the determination that death is the appropriate punishment" Woodson, 428 U.S. at 305, and that the sentence is fair. Witherspoon v. Illinois, 391 U.S. 510 (1968). Alabama's procedure does neither.

Alabama's death penalty statute establishes as one if its aggravating circumstances that a crime was "especially heinous, atrocious, and cruel." This was one of the three final aggravating circumstances in the case at bar. However, Alabama's statute does not provide any guidance as to when a murder is "especially heinous, atrocious, and cruel." [2]

The application of this aggravating circumstances has been "generous", with trial courts using it to justify death sentence in almost any time of type of case from a one victim robbery-murder to a horrible sex slaying.[3]

The use of this term by the trial court when sentencing has been remarkably similar to the use by the sentencing juries

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[2] 13-11-6(8) Code of Alabama, 1975

[3] Jacobs v. State, 361 So.2d 640 (Ala.1979); Evans v. State, 361 So.2d 672 (Ala.1978); Whisenhant v. State, 370 So.2d 1080 (Ala.Cr.App., 1979)

Georgia of the term "ourtageously or wantonly vile, horrible or inhuman in that it involved tortue, depravity of mind, or an aggravated battery to the victim" Ga. Code Ann. § 27-2534.1 (b)(7) and petitioner would submit that under the facts of this case as in Godfrey v. Georgia, _____ U.S. _____, 48 USLW 4541 (May 19, 1980), there is no way to distinguish this case, where the death penalty was imposed from the one's where the death penalty was not imposed. Godrey, 48 USLW at 4545.

Petitioner submits that murder is by definition heinous, atrocious and cruel, but when does it justify a death sentence and what guidelines are available? Never.

B. May an element of the crime properly be an aggravating circumstance?

The Alabama Supreme Court in Cook v. State, 369 So.2d 1251, 1254 (Ala.1978), ruled that you could not find two aggravating circumstances from one robbery.[4] The particular aggravating circumstance eliminated in Cook, id. was the one concerning "pecuniary gain" 13-11-6(6) Code of Alabama, 1975. The remaining was that robbery was, by definition, for pecuniary gain.

Petitioner would submit that to allow robbery to serve as an aggravating circumstance, 13-11-6(4), id., when it is an essential element in the charge for which the person is being tried, allows that circumstance to unduly weigh the aggravation/mitigation hearing in favor of the state.

Clearly, using the same fact in defining the offense and aggravation, "stacks the deck against" the accused and cannot be tolerated when the penalty of death is in question. Witherspoon v. Illinois, 391 U.S. 510 (1968).

---

[4]The trial court in the present case went back and in reliance on Cook v. State, struck the aggravating circumstance having to do with pecuniary gain. Motion for New Trial, January 30, 1979.

CONCLUSION

For the reasons set out hereinabove, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Alabama.

Respectfully submitted,

VADER A. PENNINGTON
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Mobile, Alabama 36602
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 2 day of July, 1980, served copies to all parties to this proceeding by mailing the same in the U.S. Mail, properly addressed and first class postage prepaid.

APPENDIX A

APPENDIX A—Continued

ation, the aggravating circumstances still outweigh mitigating circumstances, it is;

Therefore CONSIDERED, ORDERED AND ADJUDGED that the Motion for New Trial filed in behalf of the Defendant, Huey Edward Coon, be and the same is hereby denied, it is;

Further ORDERED, ADJUDGED AND DECREED that aggravating circumstance number three (3), as set out in this Court's order of November 20, 1978, be and the same is hereby excluded and removed from consideration by the Court. In all other respects, this Court's order of November 20, 1978, shall remain in full force and effect, it is;

Further ORDERED AND ADJUDGED that copies of this Order be furnished to the District Attorney, the Defendant's attorneys of record, and that the Sheriff be and he is hereby directed to serve a copy of this Order on the Defendant, Huey Edward Coon, and make return reflecting said service.

Done and Ordered this the 30th day of January, 1979.

Ex parte Huey Edward COON.

In re Huey Edward Coon

v.

State of Alabama.

79-62.

Supreme Court of Alabama.

Feb. 8, 1980.

Petition for Writ of Certiorari to Court of Criminal Appeals.

Donald F. Colquett, Eugenia L. Loggins, Opp, for petitioner.

Charles A. Graddick, Atty. Gen., J. Thomas Leverette, Asst. Atty. Gen., for respondent.

BLOODWORTH, Justice.

We granted the petitioner's request for certiorari to review the judgment of the Court of Criminal Appeals, 380 So.2d 980 (Ala.Cr.App.1979), upholding the conviction of petitioner under Alabama's Death Penalty Statute for the intentional killing of John Ezra Brown during the commission of a robbery.

We have carefully reviewed the opinion of the Court of Criminal Appeals and the record of the proceedings in this cause, and are convinced that each contention raised by the petitioner has been correctly answered by the Court of Criminal Appeals in its opinion. Thus, its judgment of affirmance is due to be, and is hereby, affirmed.

AFFIRMED.

All the Justices concur.

Michael HOLDERFIELD

v.

The CITY OF BIRMINGHAM.

6 Div. 38.

Court of Criminal Appeals of Alabama.

Dec. 4, 1979.

Rehearing Denied Jan. 22, 1980.

Following conviction in municipal court, defendant was convicted in the Circuit Court, Jefferson County, William H. Cole, J., of sale of obscene matter in violation of city obscenity ordinance and he appealed. The Court of Criminal Appeals, Bowen, J., held that: (1) statute requiring all cases in municipal courts to be tried by a judge without a jury was not unconstitu-

APPENDIX B

APPENDIX—Continued

the death sentence of Lewis are more than adequate to enable him to weigh the aggravating circumstances against the mitigating circumstances. The judgment rendered by this Court is founded upon the directions of The Alabama Court of Criminal Appeals that the sentence of death would not be sustained on evidence essentially the same in nature which has been declared inadequate to sustain a sentence of death by The Alabama Court of Criminal Appeals; the aggravating circumstances; the mitigating circumstances found to exist by The Alabama Court of Criminal Appeals; and the mandate to this Court by The Alabama Court of Criminal Appeals reversing the sentence of death for the sub-normality of the mind of Lewis.

"IT IS, THEREFORE, ORDERED AND ADJUDGED BY THE COURT, that the mitigating circumstances outweigh the aggravating circumstances, and that Jimmy Lewis, for the capital felony of robbery when the victim is intentionally killed, is sentenced to life imprisonment without parole, which shall be served without parole.

"DONE AND ORDERED this 13th day of November, 1979.

"/s/ Riley Green
"CIRCUIT JUDGE
"FILED IN OFFICE
THIS THE 13th Day
of November, 1979.
"/s/ Jim Ellis
"REGISTER—CLERK
CIRCUIT COURT,
COFFEE COUNTY ALA."

Therefore, the judgment of conviction and sentence by the Coffee Circuit Court (Enterprise Div.) is affirmed.

AFFIRMED.

HARRIS, P. J., and DeCARLO, BOOKOUT and BOWEN, JJ., concur.

TYSON, J., concurs in result only.

KEY NUMBER SYSTEM

Huey Edward COON

v.

STATE.

4 Div. 708.

Court of Criminal Appeals of Alabama.

Sept. 4, 1979.

Rehearing Denied Oct. 2, 1979.

Defendant was convicted in the Circuit Court, Covington County, Abner R. Powell, III, J., of intentional killing and he appealed. The Court of Criminal Appeals, Tyson, J., held that: (1) trial court did not err in denying defendant's motions for change of venue; (2) trial court did not err in refusing to grant defendant's motions for continuance; (3) defendant's rights were not violated by alleged failure of the State to disclose specific items of evidence following defendant's motions to produce; (4) defendant's confession was voluntarily given, and (5) trial court did not err in admitting testimony concerning condition of victim's body, photographs of scene of crime and of victim's body, and wallet belonging to victim.

Affirmed.

Writ denied, Ala., 380 So.2d 990.

1. Criminal Law ⇐126(2)

In prosecution for intentional killing, trial court did not err in denying defendant's motions for change of venue where no false or prejudicial publicity was contained in newspaper articles published regarding the matter and, even though some members of jury venire had seen some of the newspaper stories, each venireman stated that he or she could render true and impartial verdict based on evidence presented. Code of Ala.1975, § 15-2-20.

2. Criminal Law ⇐599(1)

In prosecution for intentional killing, trial court did not abuse its discretion in

denying defendant's motions for continuance where defense attorneys received district attorney's reply to their motion to produce seven days before trial commenced, trial court had directed that attorneys be allowed to hear taped interviews with defendant and to see any signed statements, and list of State's witnesses was furnished counsel.

8. Criminal Law ⇐1166(1)

In prosecution for intentional killing, State's failure to furnish defendant with tapes of two interviews made by police with defendant did not require reversal where composite transcript of the interviews furnished to defendant disclosed all relevant and material matter stated to the officers in the interviews and where tape of third interview in which defendant gave inculpatory statement was provided to counsel before trial.

4. Criminal Law ⇐517(7)

In prosecution for intentional killing, defendant's confession was voluntarily given even though defendant was hypnotized by an officer approximately one week before he gave his inculpatory statement, where there was no evidence that the hypnosis led defendant into making his confession or that such broke down defendant's will, or that he was otherwise induced to confess, and where he was fully advised of his Miranda rights on at least three occasions, though he was not advised of possible punishments for the offense.

5. Criminal Law ⇐636(3)

In prosecution for intentional killing, trial court did not err in excusing certain prospective jurors outside presence of defendant. Laws 1971, p. 493.

6. Criminal Law ⇐473

In prosecution for intentional killing, witness' testimony concerning condition of victim's body and wounds thereon was properly admitted.

7. Criminal Law ⇐438(4, 5)

In prosecution for intentional killing, photographs of scene of crime and of victim's body were properly admitted.

8. Criminal Law ⇐404(4)

In prosecution for intentional killing, wallet belonging to victim and its contents were properly admitted where wallet was found by woman in bedroom of her brother, who was observed with defendant outside woman's house on night of the robbery-homicide, and where officers later recovered from that residence 11 cans of beer which had been taken from scene of crime.

9. Constitutional Law ⇐276(1)
Criminal Law ⇐1206(1), 1213

Death penalty statute does not violate due process clause or Eighth Amendment. U.S.C.A.Const. Amend. 8, 14.

Donald F. Colquett, Eugenia L. Loggins, Opp, for appellant.

Charles A. Graddick, Atty. Gen. and Paul E. Johnson, Asst. Atty. Gen., for appellee.

TYSON, Judge.

Huey Edward Coon was charged in a four-count indictment under Alabama's Death Penalty Statute, § 13-11-1, through § 13-11-9, Code of Alabama 1975, for the intentional killing of John Ezra Brown by striking him about his head and body with a heavy instrument and by stabbing him with a knife while in the commission of a robbery during which some $190.00 was taken.

The jury found the appellant "guilty as charged in the indictment" and fixed punishment at death by electrocution.

Thereafter, the trial court conducted a post-conviction hearing on the aggravating as well as the mitigating circumstances as required by law. The trial judge found three aggravating circumstances, but found no mitigating circumstances, and set appellant's sentence as death by electrocution.[1]

In the early morning hours of August 29, 1978, while working as a clerk-manager in a Zippy Mart in Andalusia, John Ezra Brown was stabbed with a knife and beaten with a

1. See Appendix A, the trial court's order and judgment.

blunt instrument. He was taken to a hospital and died later that morning.

Dr. Nathan D. Fiebelman testified that he examined and treated the deceased, Brown, in the emergency room of the Andalusia Hospital that same morning. He described in detail the numerous head injuries, such as multiple fractures, and massive bleeding within the cranial bowl, received by the deceased, and expressed the view that these injuries were caused by repeated blows from a heavy object, and by stabbing with a knife on the neck and back.

Jake Whatley testified that he drove a truck and regularly delivered the Montgomery Advertiser to the Zippy Mart in Andalusia. Whatley indicated as he arrived at the store shortly before 3:00 A. M., on August 29, 1978, that two other vehicles arrived at the same time. While the drivers of the other vehicles conversed outside the store, Whatley went inside and found John Ezra Brown lying on his side near the cash register.

Whatley testified that he ran outside, called to one of the other drivers for help, re-entered the store with the other driver and saw that Mr. Brown was bleeding profusely. He then drove his truck to the Andalusia Police Department, reported the incident, and returned to the Zippy Mart. When the ambulance arrived, Whatley helped load the victim into it. On cross-examination, Whatley testified that he did not know the defendant and had not seen him at the Zippy Mart.

Mozelle McCurley testified that she was the manager of the Zippy Mart in Andalusia. She stated that as soon as she learned of the robbery she went to the store and gave I.A. Knox of the Andalusia Police Department a key which he used to lock the store.

Richard McCurley testified that he managed the Zippy Mart each day from 3:00 P. M. to 11:00 P. M. He stated that, when he went off duty at 11:00 P. M., on August 28, 1978, John Ezra Brown signed for the contents of the store's cash register, which contained approximately $200. in cash. He further testified that, Budweiser beer was being sold on special at that time, for $2.09 per six-pack.

James McCurley stated that he was the supervisor for Zippy Mart in the area. On the morning of August 29, 1978, after learning of the robbery, he went to the police station where he was shown two six-packs of Budweiser beer, one of which had a can missing. He stated that he recognized the price labels on the beer as being those used by Zippy Mart and that, he recognized the price of $2.09, appearing on the two six-packs as being the special price for which Zippy Mart was selling the beer at that time.

The witness also related that about 10:30, on the morning of the incident, he went to the Zippy Mart and unlocked it to allow two investigators access to the scene and he stayed in the store until the investigators had finished their examination.

The district manager for Zippy Mart, Luther Quillen, testified that on the morning of the incident he went to the store and inventoried the store's cash register and safe and found a shortage of $190.34.

Wilson J. Keller's testimony corroborated that of Jake Whatley. Keller stated that he arrived at the Zippy Mart about 3:00 A. M., on August 29th and that two other drivers arrived about the same time. While Keller talked outside with one driver, the other entered the store, but came back outside immediately and called to him. He then entered the store, saw the bloody condition of Mr. Brown, and while the other driver left to get the police, Keller used his C.B. radio to try and get help. Keller also stated that as he was helping the ambulance attendants load Mr. Brown into the stretcher, he noticed the cash register drawer was empty except for a few pennies.

Investigator for the State Department of Forensic Sciences, G. R. McCahan, Jr., testified that he performed a post-mortem examination on the body of John Ezra Brown. He stated that Brown died as a result of massive, multiple skull fractures and massive cranial bleeding caused by repeated blows to the head. He also observed stab

wounds on the neck and back. Furthermore, he said he secured several items from the body of Mr. Brown and from the scene of the crime for possible use as evidence.

Lt. J. T. Knox of the Andalusia Police Department testified that, at 3:00 A. M. on August 29th, he and another policeman, Farris Wood, were dispatched to the Zippy Mart where he helped Mr. Keller and Mr. Whatley load Mr. Brown onto the stretcher and into the ambulance. He noticed that the store's cash register was open and empty, except for change. He also noticed that a metal milk crate on the floor was close to where Mr. Brown's head had been lying. Lt. Knox recalled that after Mrs. McCurley locked the store, he proceeded to Eighth Avenue where he found Officer Wood and Lt. Glass talking to a suspect, Ernest Marvin. Marvin was taken to the police station by Lt. Knox and placed in a cell.

Another suspect, Charlie Jenkins, was brought in by Officer Wood and also placed in a cell. Thereafter, about 5:00 A. M., Knox and Wood returned to Eighth Avenue, found the defendant, and placed him in custody, and took him to the police station. Lt. Knox stated that he did not have an arrest warrant for the defendant when he took him in custody. That, he did not inform him that he had the right to consult an attorney; that, he did not inform him for what purpose he was being detained, nor did he explain to the defendant that he was under arrest, although he handcuffed the defendant when he placed him in the patrol car.

Lt. Knox indicated that all three suspects had been drinking something alcoholic but that in his opinion the defendant was not intoxicated.

Andalusia Investigator, Lt. Charlie Glass, testified that about 3:00 A. M., on August 29th, he was called to investigate a crime at the Zippy Mart. He said that he noticed that the cash register drawer was open and contained only change, and that a bent metal milk create, smeared with blood and hair, was found near the cash register. He locked the metal milk crate in the trunk of his police car and drove to Eighth Avenue where he and Officer Wood took Ernest Marvin in custody. Lt. Glass stated that while Lt. Knox took Marvin to the police station, he and Officer Wood drove to the home of Charlie Jenkins and were invited inside by him.

While inside, the two officers found eleven cans of cold and frosted beer under a cake cover in the kitchen. Jenkins was then taken in custody and driven to the police station by the two officers, along with the beer. Shortly after, Coon, the defendant was brought to the police station.

Lt. Glass read him (Coon) his *Miranda* rights and the defendant signed a waiver form. Coon denied knowing anything about the incident at the Zippy Mart. Lt. Glass stated that he questioned the defendant again later that morning, and again the next day. On both occasions he advised the defendant of his *Miranda* rights, and the defendant signed waiver forms prior to questioning.

Glass also related that on August 31st, he and Deputy Howard Easley, along with an investigator for the district attorney, Jim Stallings, went to an alley near Eighth Avenue, where they found some burnt clothing and two magazines, "Club" and "High Society." According to Glass, although three stores in Andalusia sell "Club," only the Zippy Mart sells "High Society."

Thereafter, on September 5th, this same group returned to this same alley and found a blade from a paring knife and additional items of clothing.

Lt. Glass admitted on cross-examination that to his knowledge, none of the items found in the alley were in any way connected to the defendant, Coon.

Officer Farris Wood of the Andalusia Police Department, testified that he lived on Eighth Avenue, three houses away from where Charlie Jenkins lived with his sister, Edith Anderson, and brother-in-law, Rufus Anderson. He said that while he was patrolling on August 29, 1978, about 2:10 A. M., he saw the defendant, Coon, also Charlie Jenkins, and Ernest Marvin in front of Jenkins' house on Eighth Avenue. Officer

Wood said he had a short conversation with them during which they mentioned that they were about to go to the Zippy Mart for beer.

After the conversation, he continued to patrol, but later was present at the police station when Whatley reported the crime at the Zippy Mart. While investigating the crime, Wood told Lt. Glass of his conversation with the defendant (Coon), Jenkins and Marvin. Thereafter, they drove over to 210 Eighth Avenue and saw Ernest Marvin run out the back door. Wood gave chase, but was unsuccessful and returned to 210 Eighth Avenue where Lt. Glass was waiting. Shortly thereafter, Marvin walked up to the two officers and was taken into custody, and transported to the police station by Officer Knox who had arrived by that time.

Lt. Glass and Officer Wood then were allowed inside Charlie Jenkins' residence by Jenkins. There they took possession of eleven cans of Budweiser beer, took Jenkins into custody, and transported him to the police station. Lt. Glass stated that later that morning he and Lt. Knox saw the defendant, Coon, walking on Eighth Avenue, that they placed him in custody and took him to the police station.

The sister of Charlie Jenkins, Edith Anderson, testified that she and her husband, Rufus Anderson lived with Charlie Jenkins at 210 Eighth Avenue. Mrs. Anderson said that after the police had taken Jenkins into custody, that the defendant came by her house on August 29th and asked for some clothes he said he had left in Jenkins' room. She said he also asked for two magazines that her husband was reading.

After receiving the magazines and the clothes, which were rolled up and wet, Coon left. Mrs. Anderson said that several weeks later she found a wallet in a chest of drawers in Charlie Jenkins' room in her house. She gave the wallet to her husband, Rufus, who took it to the police station.

On cross-examination, she testified that before August 29, 1978, she had never seen the two men's magazines that the appellant took with him. She further stated that the appellant did not live with her or have any control over her home or its contents.

Rufus Anderson's testimony corroborated that of his wife.

William H. Landrum, a forensic serologist for the Department of Forensic Science, testified that he examined a metal milk crate and items of clothing marked as belonging to John Ezra Brown for traces of blood. He said he compared his findings with a sample of blood reportedly taken from the body of the deceased, Brown, and determined that they were of the same blood type "A, n." He stated on cross-examination that to his knowledge none of the items he examined were in any way connected to the appellant.

Howard Easley, Chief Deputy Sheriff, testified that on August 31, 1978, he participated in the search of the alley behind 210 Eighth Avenue, and on August 29, participated in questioning the appellant. He said that, although appellant was never told that he might face the death penalty if convicted, he was told before questioning that he might be charged with a capital crime.

Mrs. Mozelle McCurley was recalled to the stand and testified that the Zippy Mart had the exclusive franchise to sell "High Society" in Andalusia.

Charles Brooks, a laboratory analyst for the Department of Forensic Science at Enterprise, testified that he examined the Zippy Mart in Andalusia on August 29, 1978. He identified a number of photographs of the scene and the same were admitted into evidence without objection. He explained the photographs in relation to a chart of the layout of the Zippy Mart.

On cross-examination, Brooks admitted that when he arrived at the Zippy Mart the building was open and that he did not know if anyone had been in the store prior to his arrival. Defense counsel moved to exclude his testimony, and this was overruled.

Sgt. Marion Brewer, an investigator for the Alabama Bureau of Investigation, Department of Public Safety, testified that on

the morning of August 30, 1978, the appellant was brought to his office where Howard Easley and Jim Stallings were present, by Lt. Glass, and that appellant signed a waiver of rights form after his rights were read to him.

Over objection, the form was admitted into evidence as State's Exhibit No. 41. Over objection, Brewer testified that appellant admitted being at the Zippy Mart when John Earn Brown was attacked but, that he denied any overt involvement.

Brewer said that on the afternoon of August 30, 1978, he again questioned appellant. Prior to questions, appellant's rights were read to him and appellant signed another waiver (State's Exhibit 42). Appellant made another oral statement substantially similar to the one he had made that morning and this statement was reduced to writing. Defendant read the statement, initialed each page, and signed it before a notary. The statement was admitted into evidence over objection. (State's Exhibit No. 43).

Sgt. Brewer stated that he again questioned the appellant after lunch on September 5, 1978, after appellant had signed a waiver of *Miranda* rights form after having same explained to him. At this time, appellant admitted he had taken part of the money stolen from the Zippy Mart and agreed to show the officers where it was hidden. Appellant also showed the officers where he had hidden the knife and where he had burned his own clothing that he had worn on August 29, 1978.

Brewer said that appellant finally admitted killing Brown without provocation because "something just told him to jump on that old man." Brewer then took the inculpatory statement from the appellant which was reduced to writing. The next day, appellant went over the statement line by line, pointed out corrections, initialed each page, and signed it before a notary public. (State's Exhibit No. 46). Brewer said that Howard Easley brought the knife blade which had meanwhile been found. The knife handle and blade were shown to appellant and he said this was the one.

On cross-examination, Sgt. Brewer admitted that a tape had been made of the interview with the appellant on the morning of August 30, 1978, whereupon, defense counsel moved for a mistrial because the tape was not furnished them pursuant to their motion to produce. The motion was denied.

Thereafter, defense counsel and appellant were allowed to hear the tape privately and later the judge heard the tape himself, while having before him the written statement of appellant (State's Exhibit No. 43).

Apparently, State's Exhibit No. 43 was a combined transcription of the interviews with appellant on the morning and afternoon of August 30, 1978. Both interviews were taped.

Defense counsel again moved for a mistrial on the same grounds and his motion was overruled.

On a voir dire examination, outside the jury's presence, to determine the voluntariness of State's Exhibits, Nos. 43 and 46, the appellant testified that he was questioned twice on August 29th, and twice on August 30, 1978, and each time had been read his rights and each time he had signed a waiver of rights form. He testified that he had not been allowed to communicate with his family from August 29th through September 5, 1978, and had not been told of the severity of the punishment he might receive.

Furthermore, he said that he was hypnotized, with his consent, by a Lt. Coffman on August 31, 1978, and that he did not remember what he told him.

The trial court determined that both of the statements were voluntarily made. State's Exhibit No. 43 was read to the jury over objection.

After the jury was recalled, Sgt. Brewer then testified that he again questioned appellant on September 5, 1978, after reading him his *Miranda* rights, and after appellant signed a waiver form. Over objection,

State's Exhibit No. 45 (appellant's confession) was read into evidence.

On cross-examination, Sgt. Brewer admitted he never told appellant he might face the electric chair if convicted. Furthermore, he admitted that a Lt. Coffman from Florida had hypnotized appellant on August 30, 1978, but that appellant's story did not differ, substantially, from State's Exhibit No. 45.

The tapes of the interviews on the morning and afternoon of August 30, 1978 were played to the jury while each member of the jury also heard, over objections, a tape of the September 5, 1978, interview with appellant in which he admitted killing and robbing the victim.

The appellant did not testify at trial, nor present any evidence in his behalf.

I

[1] Appellant asserts that the trial court committed reversible error in denying his two motions for a change of venue.

Section 15-2-20, Code of Alabama 1975, provides that a person charged with an indictable offense may have his trial moved to an adjacent county if "he cannot have a fair and impartial trial in the county in which the indictment is found."

In *Acoff v. State*, 50 Ala.App. 206, 278 So.2d 210 (1973) we find the following discussion:

"In *Mathis v. State*, 280 Ala. 16, 189 So.2d 564, we find the following:

"'Publicity by the press, radio and television does not necessarily constitute ground for a change of venue. See: *Denton v. State* 263 Ala. 311, 314-315, 82 So.2d 406; *Campbell v. State*, 257 Ala. 322, 324-325, 58 So.2d 623; *Littlefield v. State*, 36 Ala.App. 507, 63 So.2d 565, cert. den. 258 Ala. 532, 63 So.2d 573. Whether a motion for a change of venue should be granted is a matter addressed to the sound discretion of the trial court. See: *Cobern v. State*, 273 Ala. 547, 551, 142 So.2d 869; *Collins v. State*, 234 Ala. 197, 199, 174 So. 296; *Littlefield v. State*, supra. From a consideration of the evidence taken on the hearing of the motion, we cannot say that the trial court abused its discretion in denying the motion.'

"Additionally, the movant has the burden to reasonably satisfy the trial court that an impartial jury cannot be had in the circuit court to which the indictment is returnable. *Tiner v. State*, 271 Ala. 254, 122 So.2d 738; *Dannelly v. State*, 47 Ala. App. 363, 254 So.2d 434, cert. den. 287 Ala. 729, 254 So.2d 443."

Judge Bookout, in *Gray v. State*, 56 Ala. App. 131, 319 So.2d 750 (1975), observed the following:

"The newspaper articles objectively reported the commission of a cold and calloused crime. The articles in the record do not carry inflammatory headlines, nor do they editorialize on the facts in a manner to inflame the community or create an atmosphere of prejudice."

We have examined the newspaper articles attached to appellant's motions and find that the reporting was "factual." We observe no false or prejudicial publicity present in these newspaper articles.

As observed by Mr. Justice Bloodworth in *Mathis v. State*, 292 Ala. 732, 296 So.2d 764 (1974):

"Therefore, where, as here, there has been no showing of any actual prejudice nor any showing that the pre-trial publicity (although admittedly extensive and widespread) was anything other than 'factual,' 'truthful,' 'objective,' and 'reasonably free from any calls for action based upon emotional subjective judgments' (*Mathis v. State* [1973] 52 Ala. App. 674, 296 So.2d 760, and *Mathis v. State* [1973] 52 Ala.App. 668, 296 So.2d 755), I am unwilling to presume that the defendant was prejudiced."

Moreover, the trial court requested that questions be submitted to the judge and through him an extensive voir dire examination was allowed of all members of the jury venire. While some of the members of

2. See Vol. 5, R.P. 815-824.

the venire had seen some of the newspaper stories, nevertheless, each venireman stated that he or she could render a true and impartial verdict based on the evidence presented.

In light of the foregoing, we are of the opinion that the trial court correctly overruled appellant's motions for change of venue.

II

[2] Appellant's attorneys contend the trial court erroneously refused to grant his two motions for a continuance. Essentially both motions sought more time to prepare for trial.

The two attorneys were appointed to represent appellant on September 12, 1978, the day after the indictment was returned. These attorneys had filed a motion to produce on September 27, 1978, and received the district attorney's reply thereto on October 2, 1978.

The trial court had directed that the attorneys be allowed to hear the taped interviews with appellant and to see any signed statements.

Additionally, a list of State's witnesses was furnished counsel.

Trial of this cause did not commence until October 9, 1978.

We are of the opinion that the trial court did not abuse its discretion in denying appellant's motions for continuance. *Rogers v. State*, Ala.Cr.App., 365 So.2d 322 (1978); *Walker v. State*, 265 Ala. 233, 90 So.2d 221 (1956); *Seibold v. State*, 287 Ala. 549, 253 So.2d 302 (1970); *O'Neal v. State*, 58 Ala. App. 123, 296 So.2d 62, cert. den. 292 Ala. 736, 296 So.2d 70 (1974).

III

[3] Appellant next asserts error due to the failure of the State to disclose specific items of evidence following his two motions to produce. Specifically, appellant requested all tape recordings of interviews of appellant, and a copy of any written statements. Counsel also requested an opportunity to view all items of physical evidence, which the prosecution intended to introduce at trial.

Pursuant to appellant's motions he was furnished with a cassette recording of the September 5, 1978 interview and a transcript which was a composite of the two interviews conducted on August 30, 1978. Essentially, appellant asserts that his rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), were violated since the State did not furnish him with the actual tapes made on August 30, 1978.

We do not agree with appellant's contention. The composite transcript disclosed all relevant and material matters stated to the officers in the interviews of August 30, 1978, in which the appellant denied being a major participant in the robbery-murder. The interview, wherein he gave his inculpatory statement took place on September 5, 1978, and this was the tape provided to counsel before trial.

Moreover, this court has compared the tapes and the transcript as the same appears in the record and find no material difference. We find no violation of appellant's rights.

IV

[4] Appellant asserts that under the "totality of the circumstances" of the taking of appellant's confession on September 5, 1978, and its subsequent admission into evidence at trial, shows that such was not voluntarily given.

Essentially, appellant's argument is that he was not informed of the possible consequences due to the severity of the charge against him, and that he was hypnotized by one officer about a week before he gave his inculpatory statement.

In *Thomas v. State*, Ala., (1979) 373 So.2d 1167, the Alabama Supreme Court determined that law enforcement officers are not required to inform suspects of all possible punishments at the time they begin questioning.

While the record does indicate that appellant was hypnotised several days before he gave his inculpatory statement, there is no indication in the record that this led appellant into making his confession or that such broke down appellant's will, or that he was otherwise induced to confess to the crime.

To the contrary, the record discloses that the appellant was fully advised of his *Miranda* rights on at least three occasions. On each of these occasions, he signed a written waiver. The record also discloses that there was no abuse, threats made to appellant, no coercion or intimidation in any manner, but rather that appellant understandingly, intelligently and voluntarily gave his statement. *Williamson v. State*, Ala.Cr.App., 370 So.2d 1054, affirmed 370 So.2d 1066 (1978), and authorities therein cited; *Thomas v. State*, supra.

V

[5] Appellant next asserts that the trial court erred in excusing certain prospective jurors outside his presence.

This action of the trial court is now specifically allowed by the provisions of 1971 Ala.Acts, Local Act 200, p. 493. The Supreme Court of Alabama in the case of *Bracewell v. State*, Ala., —— So.2d —— (1979), specifically approved of the practice here challenged. Thus the trial court's action was correct.

VI

(a)

[6] Appellant asserts the trial court erred in admitting, through the testimony of two experts, Dr. Feibelman and Dr. McCochran, their statements concerning the condition of the victim's body and the wounds thereon. Such contention is without merit, since this testimony was properly admitted. *Daniels v. State*, 50 Ala.App. 88, 277 So.2d 364 (1973); *Johnson v. State*, 21 Ala.App. 565, 110 So. 55 (1926); *Dobbins v. State*, 274 Ala. 524, 149 So.2d 814 (1963); *Luckie v. State*, 55 Ala.App. 642, 318 So.2d 337, cert. den. 294 Ala. 734, 318 So.2d 341 (1975).

(b)

[7] Also, counsel challenges the admission of photographs of scene of the crime and of the deceased's body.

Such photographs were properly admitted. *Smarr v. State*, 260 Ala. 30, 68 So.2d 6 (1953); *Nichols v. State*, 267 Ala. 217, 100 So.2d 750 (1958); *Brodka v. State*, 58 Ala. App. 125, 298 So.2d 55 (1974).

VII

[8] Appellant also asserts that the wallet belonging to the deceased and its contents were improperly admitted. This wallet was found by Mrs. Anderson in the bedroom of Charlie Jenkins, her brother, who lived with her. The appellant (Coon), Jenkins and Marvin were observed outside this house on the night of the robbery-homicide by Officer Wood, about 2:10 A. M. Later the officers recovered eleven cans of Budweiser beer from this residence, which had the Zippy Mart price of $2.09 per six-pack.

Therefore, the admission of the wallet was proper. *Grissett v. State*, 241 Ala. 343, 2 So.2d 899 (1941); *Boulden v. State*, 278 Ala. 437, 179 So.2d 20 (1965).

VIII

[9] Appellant's final contentions challenge Alabama's Death Penalty Statute, in that such violates the Due Process clause of the Fourteenth Amendment and the Eighth Amendment of the United States Constitution.

The Alabama Supreme Court has considered these contentions but found the Alabama statute to meet constitutional standards. Thus, appellant's contentions have been rejected. *Jacobs v. State*, Ala.Cr.App., 361 So.2d 607, affirmed, Ala., 361 So.2d 640 (1978); *Cook v. State*, Ala.Cr.App., 369 So.2d 1243 (1977); *Williamson v. State*, Ala. Cr.App., 370 So.2d 1054, affirmed, Ala.Cr. App., 370 So.2d 1066 (1978); *Beck v. State*, Ala.Cr.App., 365 So.2d 985 (1978). This record is free of error.

The judgment is therefore affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

The Court having considered the evidence presented on the trial of this case on October ninth, tenth, eleventh and twelve of this year, and the verdict of the jury returned on October 12, 1978, the evidence presented on hearing on November 15, 1978, and the applicable law of Alabama finds the following aggravating circumstances:

One. That the Defendant, Huey Edward Coon, did intentionally kill John E. Brown in the perpetration of a robbery or attempt thereof of the said John E. Brown.

Two. That the Defendant, Huey Edward Coon, committed the capital felony with which he is charged in the commission of a robbery.

Three. That the Defendant, Huey Edward Coon, committed the capital felony with which he is charged for pecuniary gain.

Four. That the capital felony was especially heinous, atrocious or cruel in that Huey Edward Coon killed John E. Brown by beating him about the head and face with a wire, metal milk crate resulting in the death of the said John E. Brown.

The Court having considered the mitigating circumstances enumerated in Code of Alabama 1975, Title 13, Section 11-7, and also the record in this cause and any and all other evidence relating to mitigating circumstances whether introduced or not, specifically finds that no mitigating circumstances exist.

It is therefore ORDERED AND ADJUDGED that the Defendant, Huey Edward Coon, is guilty of the aggravated offense of robbery, or attempt thereof in which the victim was intentionally killed by the Defendant.

It is further ORDERED AND ADJUDGED that the aggravating circumstances as set out hereinabove outweigh mitigating circumstances which do not exist. The Court therefore sentences the Defendant, Huey Edward Coon, to death, to be executed on Wednesday, January 17, 1979, by causing to pass through the body of the Defendant, Huey Edward Coon, a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the Defendant, Huey Edward Coon, until he is dead.

The conviction and sentence being subject to automatic review under Alabama law, the sentence is suspended pending appeal. No bail.

Done and Ordered this twentieth day of November, 1978.

MR. COLQUETT: Judge, the Defendant gives notice of appeal and ask permission to proceed as a pauper.

THE COURT: All right. Let the record so reflect that notice of appeal is again given today, and we will prepare the necessary forms for the Defendant to proceed in pauperis.

You may take charge of the prisoner.

(Whereupon, Court was adjourned at 10:15 a. m.)

This cause coming on to be heard on the motion of the Defendant, Huey Edward Coon, for new trial and the Defendant and his attorneys and the District Attorney being present in open Court submitted the motion as filed to the Court without testimony or argument, and the Court having considered the Motion for New Trial filed in behalf of the Defendant, Huey Edward Coon, is of the opinion that the same is due to be denied. But, the Court is further of the opinion that the Court may have misapplied the law in its consideration of aggravating and mitigating circumstances in that the Court listed in its order of November 20, 1978, aggravating circumstance number three (3), as follows: "That the Defendant, Huey Edward Coon, committed the capital felony with which he is charged for pecuniary gain." The Court further finds, however, that when aggravating circumstance number three (3) is excluded from consider-

APPENDIX A—Continued

ation, the aggravating circumstances still outweigh mitigating circumstances, it is;

Therefore CONSIDERED, ORDERED AND ADJUDGED that the Motion for New Trial filed in behalf of the Defendant, Huey Edward Coon, be and the same is hereby denied, it is;

Further ORDERED, ADJUDGED AND DECREED that aggravating circumstance number three (3), as set out in this Court's order of November 20, 1978, be and the same is hereby excluded and removed from consideration by the Court. In all other respects, this Court's order of November 20, 1978, shall remain in full force and effect, it is;

Further ORDERED AND ADJUDGED that copies of this Order be furnished to the District Attorney, the Defendant's attorneys of record, and that the Sheriff be and he is hereby directed to serve a copy of this Order on the Defendant, Huey Edward Coon, and make return reflecting said service.

Done and Ordered this the 30th day of January, 1979.

Ex parte Huey Edward COON.

In re Huey Edward Coon

v.

State of Alabama.

78-66.

Supreme Court of Alabama.

Feb. 8, 1980.

Petition for Writ of Certiorari to Court of Criminal Appeals.

Donald F. Colquett, Eugenia L. Loggins, Opp, for petitioner.

Charles A. Graddick, Atty. Gen., J. Thomas Leverette, Asst. Atty. Gen., for respondent.

BLOODWORTH, Justice.

We granted the petitioner's request for certiorari to review the judgment of the Court of Criminal Appeals, 380 So.2d 980 (Ala.Cr.App.1979), upholding the conviction of petitioner under Alabama's Death Penalty Statute for the intentional killing of John Ezra Brown during the commission of a robbery.

We have carefully reviewed the opinion of the Court of Criminal Appeals and the record of the proceedings in this cause, and are convinced that each contention raised by the petitioner has been correctly answered by the Court of Criminal Appeals in its opinion. Thus, its judgment of affirmance is due to be, and is hereby, affirmed.

AFFIRMED.

All the Justices concur.

Michael HOLDERFIELD

v.

The CITY OF BIRMINGHAM.

6 Div. 28.

Court of Criminal Appeals of Alabama.

Dec. 4, 1979.

Rehearing Denied Jan. 22, 1980.

Following conviction in municipal court, defendant was convicted in the Circuit Court, Jefferson County, William H. Cole, J., of sale of obscene matter in violation of city obscenity ordinance and he appealed. The Court of Criminal Appeals, Bowen, J., held that: (1) statute requiring all cases in municipal courts to be tried by a judge without a jury was not unconstitu-

APPENDIX C

§ 13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

CHAPTER 11.

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

Cross references. — As to bail for persons charged with capital offenses, see § 15-13-3. As to mental examination of defendants in capital cases, see § 15-16-22. As to suspension of death sentence upon finding of insanity after conviction and sentence, see § 15-16-23. For additional provisions as to death penalty, see § 15-18-80 et seq. As to pardon or parole of person having death sentence commuted to life imprisonment, see § 15-22-27.

Sec.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.
13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.
13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.
13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.
13-11-5. Conviction and sentence of death subject to automatic review.
13-11-6. Aggravating circumstances.
13-11-7. Mitigating circumstances.
13-11-8. Appointment of experienced counsel for indigent defendants.
13-11-9. Effective date.

§ 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

§ 13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal

knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as

heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

Cross references.—As to automatic appeal from death sentence generally, see § 12-22-150. As to affirmation of judgment of court in capital cases, see § 12-22-243.

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

Cross reference. — As to defense of indigents generally, see § 15-12-1 et seq.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
JUL 3 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-5006

HUEY EDWARD COON,

Petitioner

vs

STATE OF ALABAMA,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Huey Edward Coon, who is now confined on death row at the Alabama State prison known as Holman Unit asks leave to file the attached Petition for a Writ of Certiorari to the Alabama Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

VADER A. PENNINGTON
602 Church Street
Mobile, Alabama 36602
(205) 432-1656

80-5006

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SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

HUEY EDWARD COON, Petitioner

v.

STATE OF ALABAMA

AFFIDAVIT

I, Huey Edward Coon, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the petitioner in the above entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

I was sentenced to death by a trial judge in the Circuit Court of Covington County on a charge of capital murder. The present proceeding was commenced on direct appeal through the Alabama State court system on the grounds that the Alabama capital sentencing scheme violates the Eighth and Fourteenth

Amendments and further that the statute as applied to me resulted in an unconstitutional sentence of death.

Huey Edward Coon

HUEY EDWARD COON

Huey Edward Coon

Duly witnesses and sworn to before me a Notary Public, this day of , 1980.

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No._____

HUEY EDWARD COON,

PETITIONER

VS

STATE OF ALABAMA,

RESPONDENT

AFFIDAVIT OF COUNSEL FOR PETITIONER

I am, Al Pennington, Attorney for Petitioner, Huey Edward Coon. Enclosed you will find an affidavit signed by the Petitioner, but not notarized, attesting to his poverty. My involvement came as a result of being contacted by Honorable John Carroll of Southern Poverty Law Center to represent Mr. Coon in this petition due to his indigency. Further, the trial record indicates that Mr. Coon had appointed counsel at trial and on his state court appeals Based on these facts, it is my opinion that Mr. Coon is in fact a pauper.

Vader A. Pennington

VADER A. PENNINGTON

Sworn to and subscribed before me on this 2nd day of July, 1980.

Susan Jeanie Woods

NOTARY PUBLIC

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

No. 80-5006

HUEY EDWARD COON,

Petitioner

V.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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TABLE OF CONTENTS

	Page
TABLE OF CASES	ii
BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
HOW THE FEDERAL CONSTITUTIONAL ISSUES WERE TREATED BELOW	8
REASONS WHY THE WRIT SHOULD BE GRANTED, THE JUDGMENT BELOW VACATED, AND THE CASE REMANDED TO THE ALABAMA SUPREME COURT FOR FURTHER CONSIDERATION IN LIGHT OF BECK V. ALABAMA	8
REASONS WHY THE WRIT SHOULD BE DENIED AS TO THE NON-BECK ISSUES RAISED IN THE PETITION	13
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF CASES

	Page
Bailey v. Anderson, 326 U.S., 203, 206-207 (1975)	14
Baldwin v. Alabama, No. 79-5563	9
Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980)	1,2,8,9,10, 11,12,14,17
Bellotti v. Baird, 428 U.S. 132, 147 (1976)	10, 11
Berger v. California, 393, U. S. 314 (1969)	9
Berra v. United States, 351, U.S. 131, 134 (1956)	12
Cade of Alabama, No. 79-5525	9
Crawford of Alabama, No. 79-6190	9
Clements v. State, 370 So.2d 723, 725 (Ala. 1979)	10
Dorchy v. Kansas, 264 U.S. 286, 290 (1924)	9
Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974)	14
Gregg v. Georgia, 428 U.S. 153 (1976)	13, 16
Harlin v. Missouri, 439 U.S. 459 (1979)	8
Heller v. New York, 413 U.S. 483, 494 (1973)	8
Horsley v. Alabama, No. 79-5458	9
Jacobs (John L.) v. State, 371 So.2d 448, 449 (Ala. 1979)	10
Jacobs v. State, 361 So.2d 607, 633 (Ala. Cr. App. 1977) aff'd 361 So.2d 640 (Ala. 1978) cert. denied, 439 U.S. 1122 (1979)	15
Jackson v. State, 337 So.2d 1242, 1255 (Miss. 1976)	13
Keeble v. United States, 412 U. S. 205, 208 (1973)	12
Mack v. Alabama, No. 79-5835	9

TABLE OF CASES

	Page
Morey v. Doud, 354 U.S. 457, 470 n. 16 (1957)	9
Moore v. Illinois, 408 U.S. 786, 799 (1972)	14
Proffitt v. Florida, 428, U.S. 242, 248 n. 6 (1976)	14, 15
Ritter v. Alabama, No. 79-5741	9
Roberts (Harry) v. Louisiana, 431 U.S. 633, 635 (1977)	13
State v. Dixon, 283 So.2d 1, 9 (1973)	15
Street v. New York, 394 U.S. 576, 582 (1969)	14
Stevenson v. United States 162, U. S. 313, 323 (1896)	13
Thomas v. Alabama, No. 79-5709	9
Williamson v. Alabama, No. 79-5026	9

STATUTES:

Code of Alabama 1975, § 13-11-2(a)(2)	10, 12, 15
§ 13-11-6(8)	13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 80-5006

HUEY EDWARD COON,

Petitioner

V.

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Alabama, respectfully requests that this Court grant the Petition for Writ of Certiorari insofar as it raises the issue concerning the preclusion of lesser included offenses, which was involved in Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980), vacate the judgment below, and remand the case to the Alabama Supreme Court for further consideration in light of the Beck decision. In the alternative, respondent respectfully requests that the petition be denied insofar as it raises issues not related to Beck v. Alabama, supra, and that the remainder of the petition be granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

QUESTIONS PRESENTED

1. Should the judgment of a state appellate court be vacated and the case remanded for further consideration in light of an intervening decision of this Court when the intervening decision raises state law questions which may avoid the federal issues entirely, and when the federal issues should not be summarily decided?

2. Is the present case, in which there was no evidentiary basis at trial for non-capital lesser included offense instructions, distinguishable from Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980)?

3. Should a petition for certiorari be denied as to federal issues which were not presented to or addressed by the state appellate courts below?

STATEMENT OF THE CASE

Petitioner, Huey Edward Coon, was indicted by the Grand Jury of Covington County, Alabama, during its September 1978, term, under a four court indictment charging him with the offense of robbery, during which, the victim was intentionally killed. (R. 799). Several pretrial motions filed by petitioner were denied, overruled or otherwise disposed of by the trial court. (R. 8-10, 16, 20, 32, 812).

Trial of this matter occurred during the period of October 9-12, 1978 (R. 916), before a duly qualified and struck jury. (R. 36-82). The evidence presented at the trial was conclusive of petitioner's guilt.

John Ezra Brown was employed at the Zippy-Mart Store on East Three Notch Street, in Andalusia, Alabama, as a clerk-manager. In the early morning hours of August 29, 1978, he was stabbed with a knife and beaten with a blunt instrument, apparently a metal milk crate, while at work in the store. He died a short time later that same morning at a local hopsital. (R. 141). Death was due to massive, multiple skull fractures, massive bleeding within the cranial bowl itself as a result of multiple blows to the head of considerable force. (R. 236-237).

Officer Tarris Wood remembered seeing the petitioner, Charlie Jenkins and Ernest Marvin shortly

before the robbery and intentional killing of Mr. Brown. (R. 324-325). They were getting into a car, and Jenkins said that he was going to the Zippy Mart to get a six-pack of beer. (R. 326). The three men were subsequently apprehended, before daybreak that same morning. (R. 332-338). Eleven cans of Budweiser beer were seized at Charlie Jenkins' house, when he was apprehended. (R. 335).

Sergeant Marlon Brewer, Criminal Investigator with the Alabama Bureau of Investigation, Department of Public Safety, began working on the case on the morning of August 30, 1978. (R. 484). Petitioner, Huey Coon, was brought to his office around 9:30 a.m., at which time, petitioner made an oral statement, in the presence of Lt. Glass, Howard Easley and Jim Stallings, and after signing a Miranda waiver. (R. 484-488). The substance of this statement was an admission by petitioner that he was at the Zippy Mart with Jenkins and Marvin when Mr. Brown was hit, but he denied any participation in the robbery-intentional killing of Mr. Brown. (R. 489-890). That afternoon, petitioner made another voluntary statement to Sgt. Brewer, with Investigator Jim Stallings present, and subsequent to his being informed of his Miranda rights. (R. 493). This statement was essentially the same as the first one, but with more details. (R. 494). Said statement was reduced to writing and admitted into evidence as State's Exhibit 43. (R. 494, 498).

Petitioner gave a third statement on September 5, 1978, to Sgt. Brewer and Jim Stallings. (R. 499) Again, he was informed of his Miranda rights, but he wanted to talk, understanding those rights fully. (R.

500). Furthermore, petitioner showed the officers where he had hidden the knife, burned his clothing worn that night, and thrown the tennis shoes he had on. (R. 505-508). These items and remnants of these items were found just where Coon said he had put them. (R. 505-508). At this time, petitioner admitted to Sgt. Brewer that he killed Mr. Brown. (R. 509). He said, "well, the cash register came open and he seen the money, and something just told him to jump on that old man." (R. 510). Petitioner even took the stand, outside the presence of the jury, as to the question of the voluntariness of his statements. (R. 549-568). He stated that he voluntarily gave those statements, and submitted, with his consent, to hypnosis. (R. 552, 556, 565). Coon's taped statement of September 5, 1978, revealed the following:

a). Petitioner grabbed Mr. Brown around the neck, threw him on the floor and stabbed him with a knife; (R. 610).

b). The knife broke, so he picked up a metal milk crate and struck Mr. Brown in the head repeatedly with it; (R. 611).

c). Petitioner told "Duck" to get the money out of the cash register; (R. 611).

d). Petitioner took Mr. Brown's wallet, two magazines from the rack, and two six-packs of Budweiser beer before leaving the store; (R. 612).

e). The money was split back at the house; (R. 612).

f). The three men discussed the lie they would tell police, if questioned; (R. 613).

g). Petitioner had to change clothes because those he was wearing had blood on them; (R. 613).

h). Petitioner related disposing of the

magazines, clothes, tennis shoes, broken knife and hiding the money; (R. 616).

i). He did not know why he robbed and killed Mr. Brown, it just happened. (R. 617).

Sgt. Brewer then stated that petitioner was hypnotized, with petitioner's consent, but that he told essentially the same story as in State's Exhibit 43. (R. 648-654).

Edith Anderson, Charlie Jenkins' sister and at whose house he resided, testified that petitioner did come there, after Charlie had been arrested, to get his clothes and two magazines. (R. 364-366). Later, she found a brown wallet in a chest of drawers in Charlie Jenkins' room, which was given to police by her husband. (R. 371-375). The wallet contained various identification cards bearing the name John E. Brown or John Ezra Brown, said wallet being identified by Brown's widow as having belonged to her late husband. (R. 301, 687-688).

Lieutenant Charlie Glass testified that burnt clothing, two magazines and a broken knife blade had been found in the alley petitioner had shown them. The two magazines were "Club" and "High Society", and three other stores in Andalusia sold "Club", but only the Zippy Mart sold "High Society". (R. 304).

The supervisor for Zippy Mart in the area, James McCurley, testified that he viewed 11 cans of Budweiser beer at the police station, and recognized the price tag as being Zippy Mart's. (R. 175-177).

Mr. Brown's injuries consisted of hematoma of both sides of the head, numerous fractures of the skull, with blood and brain tissue extruding from the fractures, and fractures to the right hand. (R. 135-143). An inventory revealed that the store was short of $190.34. (R. 184).

Having heard the evidence, the jury deliberated and returned a guilty verdict fixing the punishment at death. (R. 785). On November 15, 1978, the trial court held a hearing for consideration of any aggravating or mitigating circumstances. (R. 788-791, 916). The trial court took the matter under advisement and, on November 20, 1978, having found that the aggravating circumstances outweighed the non-existent mitigating circumstances, sentenced Huey Coon to death in the electric chair. (R. 792-796, 917).

Petitioner filed a motion for new trial (R. 903-929), and the same was overruled and denied by the trial court on January 30, 1979 (R. 932-933), after a hearing held on January 29, 1979 (R. 796a-796b).

The conviction and sentence, being subject to automatic appeal, was appealed and affirmed by the Alabama Court of Criminal Appeals on September 4, 1979. Application for Rehearing, having been filed on September 18, 1979, was overruled on October 2, 1979.

The Supreme Court of Alabama granted petitioner's writ of certiorari on November 20, 1979, and on February 8, 1980, the conviction was affirmed. Application for Rehearing was not timely filed. The Court ordered, on March 6, 1980, that petitioner's execution be carried out on June 13, 1980. A motion for stay of execution was denied by the Court on June 6, 1980.

Justice Powell of this Honorable Court, on April 25, 1980, granted petitioner an extension of time until July 7, 1980, in which to file a petition for writ of certiorari. A stay of execution was granted by Justice Powell on June 12, 1980.

Petitioner's Petition for Writ of Certiorari, having been filed and docketed in the Supreme Court of the United States on July 3, 1980, was received in the Office of the Alabama Attorney General on July 14, 1980.

Hence, this brief in opposition to the petition for writ of certiorari was prepared.

HOW THE FEDERAL CONSTITUTIONAL ISSUES WERE TREATED BELOW

Petitioner raised the issue concerning the preclusion of lesser included non-capital offenses at trial, and in the Alabama appellate courts. Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court rejected his arguments that the preclusion of lesser included offenses violated the Eighth and Fourteenth Amendments.

Neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court had any opportunity to consider petitioner's arguments that the application of the Code of Alabama 1975, § 13-11-6(4) and § 13-11-6(8) sentencing provisions in this case was unconstitutional, because petitioner did not raise those issues in the trial court, or in the Alabama Court of Criminal Appeals, or in the Alabama Supreme Court. The first time petitioner even mentioned those two statutory sentencing provisions was in his petition for certiorari to this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED, THE JUDGMENT BELOW VACATED, AND THE CASE REMANDED TO THE ALABAMA SUPREME COURT FOR FURTHER CONSIDERATION IN LIGHT OF BECK V. ALABAMA

1. The Intervening Decision in Beck v. Alabama, 437 U.S. ____, 48 U.S.L.W. 4801 (June 20, 1980), Makes it Proper to Vacate and Remand for Further Consideration.

The Alabama Supreme Court's decision affirming petitioner's conviction and sentence of death was issued on February 8, 1980, which was four-and-a-half months before this Court's decision in Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980). This Court has long recognized that the proper practice in such cases is to vacate the state appellate court judgment and remand for further consideration in light of the intervening decision of this Court. E.g., Harlin v. Missouri, 439 U.S. 459 (1979); Heller v. New York, 413 U.S. 483, 494 (1973);

Berger v. California, 393 U.S. 314 (1969).

At the time the Beck case was decided, there were nine other Alabama capital punishment cases pending before this Court on petitions for writs of certiorari to the Alabama Supreme Court. The respondent, State of Alabama, sent a letter dated June 23, 1980, requesting that this Court not reverse the judgments in those nine other cases but instead remand them to the Alabama Supreme Court for further consideration in light of the Beck decision. On June 30, 1980, this Court entered orders vacating and remanding instead of reversing those nine cases. They are: Williamson v. Alabama, No. 79-5026; Wilson v. Alabama, No. 79-5301; Horsley v. Alabama, No. 79-5458; Cade v. Alabama, No. 79-5525; Baldwin v. Alabama, No. 79-5563; Thomas v. Alabama, No. 79-5709; Ritter v. Alabama, No. 79-5741; Mack v. Alabama, No. 79-5835; and Crawford v. Alabama, No. 79-6190. This Court should take the same action in the present case.

2. Reconsideration by the Alabama Supreme Court is Particularly Appropriate, Because State Law Issues Raised in the Wake of the Beck Decision May be Determinative.

This Court's decision in Beck v. Alabama, supra, holding the preclusion clause of Alabama's capital punishment statute unconstitutional as it applied in that case raises a serious and difficult question of whether that clause is severable from the remainder of the statute. Severability is a state law question which should be decided by the Alabama Supreme Court. E.g., Morey v. Doud, 354 U.S. 457, 470 n. 16 (1957); Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

If the Alabama Supreme Court decides as a matter of state law that the preclusion clause is not severable and that the entire statute is due to be invalidated, then petitioner's conviction and sentence will be invalid as a matter of state law and there will be no necessity for further

inquiry into any federal constitutional issues. Accordingly, there is no present necessity for this Court to address the federal constitutional issue of whether this case is distinguishable from Beck, because that issue may be rendered moot by the Alabama Supreme Court's decision on severability. Cf., Bellotti v. Baird, 428 U.S. 132, 147 (1976) (abstention is appropriate where answers to state law questions "might avoid in whole or part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem").

Another state law question which should be answered before the federal constitutional issues are addressed concerns what, if any, lesser included offenses are definitionally possible as a matter of state law when a defendant like petitioner is charged with the Code of Alabama 1975, § 13-11-2(a)(2) capital offense of robbery during which the defendant was intentionally killed. While the petitioner in Beck was also convicted of violating § 13-11-2(a)(2), he was not charged with and convicted of robbery-intentional killing, but instead he was charged with and convicted of robbery-murder. The difference is that the indictment in Beck gratuitously averred that the intentional killing was done "with malice aforethought," an averment of first degree murder. See, Respondent's Brief on the Merits, Beck v. Alabama, O. T. 1979, No. 78-6621, page 3 n. 2. The Alabama Supreme Court has held that while such an additional averment is not required, if the State makes the additional averment that the victim was murdered in the first degree instead of simply intentionally killed, then the State must prove murder in the first degree. E.g., Clements v. State, 370 So.2d 723, 725 (Ala. 1979); Jacobs (John L.) v. State, 371 So.2d 448, 449 (Ala. 1979).

Since the State in Beck gratuitously averred murder in the first degree instead of intentional killing, it was clear as a matter of state law that murder was a lesser

included offense as was robbery, and the State conceded that point. Beck v. Alabama, 48 U.S.L.W. at 4802 & n. 5. But in the present case it is not clear what the lesser included offenses, if any, are because the indictment did not gratuitously aver that the intentional killing was done "with malice aforethought." (R. 799) Certainly, "intentional killing" is not a lesser included offense, because no such crime is defined and punished anywhere in Alabama's statutes. "Intentional killing" exists only as a component part or element of robbery-intentional killing, a capital offense. The Alabama Supreme Court has not yet decided what lesser included offenses exist in a robbery-intentional killing capital case, because that issue never arose prior to Beck.

In the words of Bellotti v. Baird, 428 U.S. 132, 148 (1976), until the Alabama Supreme Court decides the state law issues raised in the wake of the Beck decision, "it is impossible to define precisely the constitutional question presented" in this case. The Alabama Supreme Court can decide the state law issues and thereby define precisely the federal constitutional questions presented, or perhaps even avoid altogether the necessity for federal constitutional adjudication, if this case is remanded for further consideration in light of Beck. Such a remand is especially desirable since the merits of the federal constitutional issue which may be presented by this case should not be summarily decided.

3. The Merits of the Federal Constitutional Issues Presented by this Case Should Not Be Summarily Decided.

The present case is materially different from the Beck case and that difference alters the federal constitutional issues sufficiently enough to require full briefing and argument before any decision on the merits. The crucial difference between this case and the Beck case is that in the present case there was no basis in the evidence at trial for any lesser included offense instruction. The grant of certiorari in Beck was limited to the following question:

> May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict? 48 U.S.L.W. 4801 (Emphasis added).

Because there was a conflict in the evidence about Beck's intent to kill, which is a necessary element of the capital offense but not of the lesser included non-capital offenses of robbery and felony murder, which were encompassed by the indictment in that case, the State conceded in Beck that there was a factual basis for a lesser offense verdict under state law. 48 U.S.L.W. at 4802 & n. 5. The State conceded that the jury in that case would have been instructed on two lesser included offenses had it not been for the preclusion clause. Id. The present case is different.

In the present case, as a matter of state law the petitioner was either guilty of the Code of Alabama 1975, § 13-11-2(a)(2) capital offense of robbery during which he intentionally killed the victim, or he was guilty of nothing at all. There was no evidence placing into dispute the petitioner's intent to kill, and petitioner's confession admitting the intentional killing was admitted into evidence. (R. 512, 607).

That factual distinction between the present case and Beck mandates a different holding in the two cases. Not only did this Court expressly limit its holding in Beck to cases in which there was an evidentiary basis at trial for lesser included offenses, Beck v. Alabama, supra, 48 U.S.L.W. 4801 ("We now hold that the death penalty may not be imposed under these circumstances."), but all of the precedents relied upon in that decision are similarly limited. E.g., Keeble v. United States, 412 U.S. 205, 208 (1973) ("if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater"), quoted on 48 U.S.L.W. at 4803; Berra v. United States, 351 U.S. 131, 134 (1956) ("if the evidence justified it"), quoted on 48 U.S.L.W.

at 4804 n. 11; Stevenson v. United States, 162 U.S. 313, 323 (1896) ("if there be any evidence fairly tending to bear upon the issue"), quoted on 48 U.S.L.W. at 4803-4804 n. 11; Jackson v. State, 337 So.2d 1242, 1255 (Miss. 1976) (not "indiscriminately or automatically," but only when "warranted by the evidence"), summarized on 48 U.S.L.W. at 4803 n. 10.

Any extension of Beck to mandate lesser included offense instructions even when there was no evidentiary basis for them at trial would not only conflict with all those precedents but would also be contrary to the holding in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, this Court upheld Georgia's capital punishment statute which provides that lesser included offense instructions shall be given only when there is evidence to support them. 428 U.S. at 160, 161 n. 2 (joint opinion); id., at 215-216 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.). This long line of precedents should not be overturned without full briefing and argument, and this is especially true in light of the confusion caused by a summary ruling on the merits in a past capital case. See, Roberts (Harry) v. Louisiana, 431 U.S. 633, 635 (1977) (per curiam); id., at 639 (concurring opinion of Blackmun, J., joined by White and Rehnquist, J.J.). At the very least, the conviction and sentence in this case should not be summarily reversed. If the judgment is not vacated and the case remanded to the Alabama Supreme Court for further consideration in light of the Beck decision, then full briefing and argument on the merits should be ordered.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO THE NON-BECK ISSUES RAISED IN THE PETITION

1. The Non-Beck Issues Set Out in the Petition Were Not Presented to or Decided by the Alabama Appellate Courts.

The petitioner argues that the Code of Alabama 1975, § 13-11-6(8) aggravating circumstance that the capital felony was "especially heinous, atrocious or cruel" is unconstitutional.

Petitioner also argues that it is unconstitutional to find and consider the § 13-11-6(4) aggravating circumstance that the capital felony was committed during a robbery in a case in which the defendant was convicted of the § 13-11-2(a)(2) capital offense of robbery-intentional killing. Petition for Writ of Certiorari at 6-7. The short answer to both of these arguments is that petitioner did not raise them either at trial or in the Alabama appellate courts. While petitioner did unsuccessfully challenge in the Alabama appellate courts the constitutionality of the statutory provision precluding lesser included offenses, he made no challenge to the two sentencing provisions which he now mentions for the first time. When a state appellate court fails to pass on a particular federal question, this Court should presume that it was due to the want of proper presentation, unless the aggrieved party can show to the contrary. Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 582 (1969).

Because petitioner did not present the § 13-11-6(4) and § 13-11-6(8) issues to the courts below, this Court need not decide them, Beck v. Alabama, supra, 48 U.S.L.W. at 4803 n. 8 (majority opinion), Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide them, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide them. Beck v. Alabama, supra, 48 U.S.L.W. at 4807 (dissenting opinion of Rehnquist, J., joined by White, J.); Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. § 1257 (2) and (3).

2. There is No Merit in Petitioner's Contention That Code of Alabama 1975, § 13-11-6(8) Is Unconstitutional.

Alternatively, the writ should be denied insofar as it challenges the two statutory sentencing provisions because the challenges are without merit. The Code of Alabama 1975, § 13-11-6(8) aggravating circumstance that "[t]he capital felony was especially heinous, atrocious and cruel" is identical with the eighth aggravating circumstance of the Florida statute which was upheld in Proffitt v. Florida,

428 U.S. 242, 248 n. 6 (1976). Not only is the statutory language the same, but Alabama's appellate courts have adopted the construction placed upon it by the Florida Supreme Court in State v. Dixon, 283 So.2d 1, 9 (1973), see Jacobs v. State, 361 So.2d 607, 633 (Ala. Cr. App. 1977), aff'd 361 So.2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122 (1979), and that construction has been expressly approved by this Court. See, Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) (joint opinion).

3. There is No Merit in Petitioner's Contention That It is Unconstitutional for a Trial Judge To Find and Consider the Code of Alabama 1975, § 13-11-6(4) Aggravating Circumstance in a § 13-11-2(a)(2) Capital Case.

Nor is there any merit in petitioner's argument that it is unconstitutional for a trial judge as the sentencing authority to find and consider the § 13-11-6(4) aggravating circumstance that the capital felony was committed during a robbery in a case in which the defendant has been convicted of the § 13-11-2(a)(2) capital offense of robbery-intentional killing. The § 13-11-6(4) aggravating circumstance is virtually identical to the fourth aggravating circumstance of the Florida statute, see, Proffitt v. Florida, 428 U.S. at 249 n. 6, the only difference being that Alabama's provision is slightly more narrow.

The reason the so-called "overlap" issue arises under Alabama's statute but not under Florida's statute is that the definition of the underlying capital offenses is significantly more narrow in Alabama. Compare, Code of Alabama 1975, § 13-11-2(a), with Fla. Stat. Ann., § 782.04 (Supp. 1976-1977), as quoted in Proffitt v. Florida, 428 U.S. at 247 n. 4. Whereas all premeditated unlawful killings are capital felonies in Florida, Alabama's statute excludes from the definition of capital offenses domestic killings and killings where intent is supplied by the felony murder rule.

In place of Florida's broad definition of capital offenses, Alabama limits capital offenses to narrowly prescribed circumstances, one of which is a robbery during which the victim was intentionally killed by the defendant. Only because of Alabama's laudable attempt to narrow the definition of capital offenses, see, Gregg v. Georgia, 428 U.S. 153, 222 (1976) (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.), can the petitioner complain of any "overlap" between the definitions and the aggravating circumstances. Such an "overlap" does not offend the Constitution, because exactly the same result would have been achieved had Alabama done as Florida did and defined as capital all intentional killings. If Alabama had done that, petitioner would have been convicted of the capital offense of intentionally killing another human being, and he then would have been sentenced to death based on a finding of the same three aggravating circumstances that were found in this case.

In any event, it is not unconstitutional to find and consider the § 13-11-6(4) aggravating circumstance in a § 13-11-2(a)(2) capital offense case, because such a finding amounts to nothing more than consideration of the nature of the crime in the determination of the sentence. To hold that such a consideration is improper would be to turn back the clock on one of the most enlightened developments in Anglo-American sentencing practices — making the sentence fit the crime. The sentence cannot properly fit the crime unless the crime can be considered in determining the sentence, which is what the "overlap" of § 13-11-2(a)(2) and § 13-11-6(4) accomplishes.

CONCLUSION

For these reasons, the petition insofar as it raises issues related to Beck v. Alabama, 437 U.S. ___, 48 U.S.L.W. 4801 (June 20, 1980), should be granted, the judgment below vacated, and the case remanded to the Alabama Supreme Court for further consideration in light of the Beck decision. Alternatively, the petition should be denied insofar as it raises issues not related to Beck, and the remainder of the petition granted with full briefing and argument ordered on the issue of whether the present case is distinguishable from the Beck case.

Respectfully submitted,

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